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CHARLES ELMORE CROPLE
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IN THE

Supreme Court of the United States

October Term, 1951

No. 505

PETER DURYEE, Trustee of the Property of The New Jersey and New York Railroad Company,

Petitioner,

vs.

ERIE RAILROAD COMPANY, JOHN A. HADDEN, C. E. DENNEY and ROBERT E. WOODRUFF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JOHN B. TITTMANN,
ANDREW M. CALAMARI,
of Counsel.

December 27, 1951.

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IN THE

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No. .....

PETER DURYEE, Trustee of the Property of The New Jersey and New York Railroad Company,

Petitioner,

vs.

ERIE RAILROAD COMPANY, JOHN A. HADDEN, C. E. DENNEY and ROBERT E. WOODRUFF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Peter Duryee, Trustee of the Property of The New Jersey and New York Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on October 19, 1951, affirming a judgment of the District Court of the United States for the Northern District of Ohio, Eastern Division, granting summary judgment against petitioner (R. 108-109).*

* References noted as such are to pages of the transcript of record. References (fol.) are to the transcript of record by folio number. References to pages of the Erie Reorganization Record are referred to as (E.).

Opinions Below

The decision of the Court of Appeals which was without opinion (R. 129, *et seq.*) is reported in 191 F. 2d 855. The opinion (R. 42-48) of the District Court (Freed, J.) is reported in 91 F. Supp. 1009.

Jurisdiction

The judgment of the Court of Appeals was entered on October 19, 1950. The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1254 (1) and 2101 (c).

Questions Presented

1. Whether under Rule 56 of the Federal Rules of Civil Procedure it is permissible to make summary disposition against petitioner on the ground that a "bar order" obtained by respondent Erie under Section 77 of the Bankruptcy Act is a complete defense to the plaintiff's action regardless of the nature or extent of any fraud that may have been practiced upon the court in the procurement of that "bar order."

2. Whether the courts below committed reversible error in holding that the plaintiff's claim was barred by prior decisions.

3. Whether, where a reorganization proceeding under Section 77 of the Bankruptcy Act has been transferred from one district court to another and the trustees appointed by the first court have been discharged, the limitation of Section 11(d) of the Bankruptcy Act applies to suits against said trustees before the transferred reorganization proceedings are terminated.

Statutes and Rules Involved

The pertinent provisions of Sections 11(d) and 77(g) of the Bankruptcy Act (11 U. S. C. § 29d and § 205g), as amended, are set forth in Appendix "A" *infra*, page 15.

The pertinent provisions of Rule 56 of the Federal Rules of Civil Procedure are set forth in Appendix "B", *infra*, pages 15-16.

Statement

Case at Bar

Petitioner is Trustee of the Property of The New Jersey and New York Railroad Company (hereinafter called "The New Jersey") in reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of New Jersey. On September 19, 1949 he instituted the present action against respondent Erie Railroad Company (hereinafter called "Erie") and the individual respondents in the United States District Court for the Northern District of Ohio, Eastern Division (hereinafter called "the district court" or "the district court in Ohio").

The complaint (R. 2-16) alleges in substance that the Erie during the period from December 4, 1912 to June 30, 1938, and the individual respondents John A. Hadden and Robert E. Woodruff, as trustees of both the Erie and The New Jersey in reorganization, for the period from June 30, 1938 to December 30, 1941, dominated, controlled, managed and operated The New Jersey as a mere department and adjunct and instrumentality of said respondent Erie, and that said management and operation was in violation of said respondents' respective trusts, fiduciary obligations, and duties to the stockholders and creditors of The New

Jersey, being a part of a fraudulent conspiracy and plan to despoil the assets and property of The New Jersey. It further alleges that said respondents, in order to benefit and unjustly enrich respondent Erie, intentionally defrauded the stockholders and creditors of The New Jersey. The fraud and spoliation alleged was accomplished by operating agreements, equipment leases, service charges, freight rate divisions and advertising, and other miscellaneous agreements, all of which were unfair and inequitable to The New Jersey resulting in losses in excess of 10 million dollars to said company with corresponding benefits to the respondent Erie. The complaint prays for an accounting and payment of the damages suffered (fol. 35).

Petitioner served notice of taking depositions of the respondents for discovery purposes pursuant to Rule 26, *et seq.* of the Federal Rules of Civil Procedure (R. 17). The respondents filed no answer to the complaint but in lieu thereof served a motion for summary judgment (R. 19) on the ground that petitioner's claims were barred by prior decisions of the district court (fol. 57), orders of the district court sitting in bankruptcy in case No. 45839 entitled *"In the Matter of the Erie Railroad Company, Debtor in Reorganization"* and applicable provisions of the Federal Bankruptcy Statutes (fol. 58).

Respondents moved pursuant to Rule 30(b) of the Federal Rules of Civil Procedure to postpone the taking of depositions by the petitioner (R. 23). Petitioner moved pursuant to Rule 56(f) of the Federal Rules of Civil Procedure for continuance of the motion for summary judgment until petitioner had been granted an appropriate opportunity for taking depositions, discovery, inspection of documents, preparation of affidavits and exhibits in opposition to said motion for summary judgment (R. 34).

A hearing was held before the district court on January 9, 1950. While the respondents had filed no answer raising any affirmative defenses, at said hearing they re-

lied strongly on an order (Order No. 386) entered in the *Erie Reorganization* case (E. 4809-73), referred to in the record as the "bar order" (R. 64-65).

In answer to this affirmative defense, petitioner contended that the "bar order" was no defense to his cause of action since it was obtained by a fraud on the court (R. 74). To substantiate his claim, plaintiff sought the benefit of all discovery procedures provided for in the Rules (R. 74). This issue was specifically presented as shown by the following colloquy and became the main bone of contention:

> "The Court: That is one contention. If your contention is that, what you are seeking to show by the depositions is a fraud on the court—that is one thing. If you are seeking to show fraud, that is another proposition.
>
> Mr. Buell: No. I am seeking to show fraud on the court, so the 'bar order' doesn't apply to us. The other fraud is alleged in the complaint" (R. 84).

The District Judge filed his memorandum opinion June 30, 1950 directing summary judgment for all respondents (R. 42-48). Petitioner thereafter filed and served his motion for rehearing and reargument with supporting affidavits and exhibits (R. 49-103). This motion was overruled on August 28, 1950 without further hearing (R. 117). Final judgment was entered in the district court on August 28, 1950, granting summary judgment in favor of all respondents (R. 108-109).

Petitioner appealed from said judgment to the Court of Appeals for the Sixth Circuit (R. 118). On October 19, 1951 the Court of Appeals rendered its decision and judgment affirming without opinion the judgment of the district court (R. 129, *et seq.*), for the reasons stated in the opinion of that court.

Prior Litigation

In granting summary judgment in favor of respondent Erie, the district court took judicial notice of and relied upon three prior decisions by that court (R. 43-45). These were *Beckley* v. *Erie Railroad Co.* (No. 24343), *Duryee* v. *Erie Railroad Comany* (No. 24855) and *In Re Petition of Charles Massie* for Order No. 442 in Erie Reorganization Proceedings (45839). All three were decided in one opinion 76 F. Supp. 635 (1948), notwithstanding they were separate actions. Beckley and Duryee appealed to the court of appeals which affirmed. The opinions are reported in 175 F. 2d 58, 64 (1949). Duryee's petition for certiorari was denied by this court in 338 U. S. 860 (1949).

The *Duryee* case asserted a cause of action against Erie based upon the "instrumentality doctrine" seeking to have debts of The New Jersey in excess of one million dollars declared to be debts of the parent Erie because of the complete domination and control exercised by Erie over The New Jersey which made the latter a mere department of the former. The complaint did not allege fraud. This cause of action was authorized by the first numbered paragraph (fol. 40) in an order entered by United States District Court for the District of New Jersey, *In the Matter of The New Jersey and New York Railroad Company*, No. 2480 a (R. 13-16).

The *Beckley* case was a suit by certain bondholders of The New Jersey seeking to establish a constructive trust under which the funded debt of The New Jersey would be declared an obligation of Erie. The complaint alleged that Erie had intentionally so managed The New Jersey as to despoil it of all its profits and earnings for the benefit of Erie and, therefore, defrauded The New Jersey's bondholders. Petitioner was not a party to this case. There was no allegation in the Beckley suit that the "bar order" had been obtained by fraud on the court and that issue was not litigated.

The Massie petition, on behalf of certain bondholders of The New Jersey, was filed in the Erie Reorganization proceedings and sought to modify the "bar order" so as to permit plenary suit against Erie for claims of The New Jersey resulting from Erie's mismanagement. The Massie petition did allege fraud against the reorganization court in obtaining the so-called "bar order" (fols. 129-31). Petitioner was not a party to this petition.

Erie Reorganization

In January, 1938, respondent Erie petitioned the district court of Ohio for reorganization under Section 77 of the Bankruptcy Act. Six months later, The New Jersey petitioned the same for reorganization as part of the parent Erie's reorganization (E. 585-88). The two trustees of the Erie, one of whom was its president, and also president of The New Jersey, were also appointed as trustees of The New Jersey (E. 735-39).

A Plan of Reorganization of the Erie was confirmed by the court in Ohio in June, 1941, but no Plan for reorganizing The New Jersey was proposed (E. 3783-98). The trustees petitioned for the dismissal of The New Jersey from the Erie reorganization proceeding (E. 4213-19). However, no attempt was made to comply with the prerequisites to a dismissal of such a proceeding required by Section 77(g) of the Bankruptcy Act (See Appendix "A"). The discharge of the individual respondents as trustees of The New Jersey by the District Court in Ohio was conditioned upon the transfer of the reorganization proceedings to the District Court for the District of New Jersey. Order No. 343 (E. 4265) contemplated the appointment of a trustee for The New Jersey by a court of competent jurisdiction in anticipation of separating that company from the Erie Reorganization Proceedings and provided (E. 4267) that

> "• • • when and if such receiver or trustee is so appointed and qualified, the trustee of the property of

The New Jersey and New York Railroad Company shall file their petition herein for a further order in the premises."

Thereafter petitioner was appointed trustee by the United States District Court for the District of New Jersey and Order No. 376 (E. 4715) was entered on December 8, 1941 transferring the property of The New Jersey to petitioner, Peter Duryee, as trustee appointed by the United States District Court for the District of New Jersey as of 12:01 A. M. January 1, 1942 provided that said trustee had duly qualified at that time.

On January 2, 1942 on oral motion of counsel for respondents Robert E. Woodruff and John A. Hadden as trustees of the property of The New Jersey, Order No. 393 (E. 4895) was entered confirming the vesting of the property of The New Jersey in Peter Duryee as trustee appointed by the United States District Court for the District of New Jersey and discharging the Ohio trustees as of the effective date of the transfer of the estate of The New Jersey from the Ohio to the New Jersey court.

The reorganization of The New Jersey in the United States District Court for the District of New Jersey is still pending.

Reasons for Granting the Writ

1. The basic question before the district court was whether the final decree and particularly the "bar order" in the Erie Reorganization proceedings precluded the petitioner from maintaining this suit regardless of the nature and extent of any fraud which may have been practiced upon the court in obtaining said decree and order. Petitioner contended that the decree and order had been obtained by fraud and sought depositions and discovery to substantiate that claim. Respondent Erie contended that the decree and order could not be so attacked.

The district court refused to meet the issue raised by petitioner, basing its decision on an erroneous application of the doctrine of res judicata. The court of appeals affirmed on the basis of the district court's opinion. The result prevents discovery and forecloses all opportunity for a factual investigation of a serious charge of fraud in the judicial reorganization of the Erie Railroad Company.

The failure of the courts below to meet this issue indicates a misapprehension of the doctrine laid down by this court in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238 (1944). The type of fraud raised as an issue in the courts below would have as far reaching effect as that dealt with in the *Hazel-Atlas* case, where this court, on page 246, stated:

> "It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

The lower courts may have been reluctant to face this issue of fraud because of an unwarranted assumption that on the record of the Erie Reorganization fraud is in fact improbable. Cf. *Duryee* v. *Erie R. Co.*, 175 F. 2d 58 at 62. In attempting to meet the charge of fraud upon the court in the procurement of the "bar order" emphasis has always been laid upon a report purporting to have been made by a Mr. Richardson, an alleged independent expert (R. 59-60). It has been argued and was at least once believed that said report was based upon a thorough and impartial investigation of all of the relationships existing between petitioner and respondent Erie since 1912. Cf.

Duryee v. *Erie R. Co., supra.* And yet neither the arguments nor their unwarranted acceptance were based upon any factual investigation of either the authenticity or the accuracy of said report.

It will not be disputed that the allegedly impartial report of Mr. Richardson purports to approve a $5,800,000 claim by respondent Erie against The New Jersey, and was a material prerequisite to the entry of the final decree and "bar order" in the Erie Reorganization Proceeding.

The prominence given to the Richardson Report in the prior history of this litigation is indicative of the danger involved in summary disposition without adequate investigation of the facts or lack of facts which may underlie the written record. Cf. *Arnstein* v. *Porter,* 154 F. 2d 464, 471 (2 Cir., 1946); *Doehler Metal Furniture Co.* v. *United States,* 149 F. 2d 130 (2 Cir., 1945).

Instead of conclusively demonstrating the integrity of respondent Erie, the Richardson Report failed to evaluate the fairness of the contractual relationship between Erie and New Jersey since 1912. Richardson approved a $5,800,000 claim of Erie on the basis of reasonable charges of $250,000 a year for 20 years when in fact Erie's claim covered only 9 years. He examined records applicable only to the month of April, 1939, in passing upon Erie's claim covering the period from November, 1929 until June, 1938. He made no examination of the charges based on freight interchanged although such charges were a major item in Erie's $5,800,000 claim. He failed to consider contract changes between Erie and The New Jersey in 1935 and 1936 by which the amounts chargeable against The New Jersey were reduced by $186,000 per year, and failed to indicate whether in view of said reduction the amounts charged against The New Jersey for the prior period were exorbitant. For all of this he purportedly received a fee of only $550.

Certainly, if as a result of the discovery procedures authorized by the Rules it should be determined that the Richardson Report was the result of a deliberate attempt to withhold and conceal material facts from the Reorganization Court, and conceivably not even prepared by its named author, no court under the doctrine of the *Hazel-Atlas* case would be justified in perpetuating the effect of such a fraud on its own administration of justice.

If, as petitioner contends, the issue of fraud should have been faced, disposition by summary judgment was patently improper. *Arenas* v. *United States*, 322 U. S. 419, 431, 434 (1944); *Hazel-Atlas Co.* v. *Hartford Empire Co.*, *supra*, page 249, footnote 5.

2. Rather than meet the issue of fraud the district court granted summary judgment in favor of respondent Erie on the ground that petitioner was barred from maintaining his present cause of action by the doctrine of res judicata (R. 46). This holding is in direct conflict with this court's enunciation of the principle of res judicata in *Commissioner* v. *Sunnen*, 333 U. S. 591, 597-8 (1948). The cause of action asserted in the case at bar is not the same as the causes of action asserted in the three prior proceedings upon which the district court relied, and therefore petitioner is not concluded as to matters which were not actually litigated and determined in the prior proceedings.

In the prior *Duryee* case (*supra*, p. 6) the issue of fraud in the procurement of the final decree and "bar order" in the Erie reorganization was not raised by the pleadings. That said issue was neither litigated nor decided is evident from the opinion of the court of appeals which stated in 175 F. 2d 58, 63:

> "As to the matter of fraud, there are no allegations in appellant's complaint that there was anything fraudulent, or constructively fraudulent, about the conduct of Erie with respect to its domination of New

> Jersey, or with regard to the Erie reorganization or the entry of the "bar" order. Standing alone, the fact of domination by a corporation of its subsidiary is not fraudulent."

The *Beckley* case (*supra*, p. 6), sought to have the funded debt of the New Jersey declared to be the debt of the Erie on the basis of a constructive trust predicated upon the fraudulent mismanagement by Erie. There was no allegation in that case that the "bar order" had been obtained by fraud upon the court which issued it. Neither the district court nor the court of appeals reached the merits of the allegations of the Beckley complaint. The decision against Beckley was based entirely upon the doctrine of laches, the court stating, 76 F. Supp. 635, 637:

> "* * * This court finds that the bondholders of The New Jersey & New York Railroad are chargeable with knowledge of what took place in this court with reference to the reorganization of the Erie Railroad. The essential allegations of the Complaint in this cause were known or should have been known to the plaintiff and to others for whom he sues, long prior to the institution of this action, and the court finds that they were guilty of laches in not asserting at a much earlier date the claims set out in the present Complaint."

Petitioner was specifically exonerated from the laches charged against Beckley and the bondholders. Therefore, the case did not litigate or determine any issue now presented by petitioners in the case at bar.

The Massie petition (*supra*, p. 7), sought a reopening of the Erie reorganization proceeding including the "bar order" on the ground that such order and the final decree had been obtained by fraud. The courts below relied upon this allegation as raising the issue of fraud in the procurement of the "bar order" and held petition-

er precluded in this case (R. 44, fol. 131). Petitioner was not a party to that proceeding. Nor was the issue of fraud in the procurement of the "bar order" litigated and determined on its merits therein. The court based its decision against Massie specifically upon the doctrine of laches, stating, 76 F. Supp. 635, 638:

> "The petition was not filed in due time, and the petitioner and those for whom he acts are chargeable with knowledge of all the proceedings with reference to the reorganization of the Erie Railroad Company."

As in the Beckley decision, your petitioner was specifically exonerated from the laches charged against Massie.

3. The decision below misapprehended the scope and meaning of Section 11(d) of the Bankruptcy Act (11 U. S. C. § 29d) and therefore erroneously applied the statute of limitations to the cause of action against the individual respondents (See Appendix "A").

The district court in Ohio, in dismissing The New Jersey from the Erie reorganization proceeding, was merely transferring the estate of The New Jersey in reorganization from the district court in Ohio to the district court in New Jersey (*supra*, pp. 7-8). Had a dismissal and consequent closing of The New Jersey estate been intended the court would have complied with Section 77(g) of the Bankruptcy Act (See Appendix "A"). The transfer was conditioned upon the appointment and qualification of a trustee of the property of The New Jersey under a court of competent jurisdiction. After that transfer had been effectuated, the trustees of The New Jersey appointed by and acting under the jurisdiction of the district court of Ohio were discharged. The estate of The New Jersey in reorganization under Section 77 of the Bankruptcy Act was not closed and is still pending (*supra*, p. 8).

If the decision below is construed to apply Section 11(d) of the Bankruptcy Act in bar of the present cause of action

against the individual respondents, it is in conflict with the plain wording of that Section which fixes the running of the limitation period from the date "the estate has been closed." Such holding is also in conflict with a decision by the United States District Court of Kentucky in *Curtis* v. *Drybrough*, 70 F. Supp. 151 (W. D. Ky., 1947) where Section 11(d) of the Bankruptcy Act was held inapplicable to a suit by a successor trustee against his predecessor trustee who had been discharged while the estate was still in process of reorganization and had not been closed.

If the decision below is construed as granting summary judgment in favor of the individual respondents because of laches on the part of petitioner (R. 28), the granting of summary judgment on such a basis is in conflict with the decisions of this court. *Arenas* v. *United States*, 322 U. S. 419 (1944). The doctrine of laches depends upon the particular circumstances of each case in which it is applied. Circumstances can excuse the mere passage of time and disposition by summary judgment of such an issue involving disputed questions of fact is improper.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOHN B. TITTMANN,
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December 27, 1951.

Appendix "A"

Section 11(d) of the Bankruptcy Act (11 U. S. C. § 29d) provides:

> "Suits shall not be brought against a person who has acted as a receiver or trustee of a bankrupt estate, upon any matter arising in connection with the administration thereof, subsequent to two years after the estate has been closed."

Section 77(g) of the Bankruptcy Act (11 U. S. C., § 205g) provides:

> "If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order."

Appendix "B"

The pertinent provisions of Rule 56 of the Federal Rules of Civil Procedure are as follows:

"Summary Judgment

"• • •

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judg-

ment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

"• • •

"(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"• • •"

FEB 8 1952

In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 505.

PETER DEMUTH,
Trustee of the Property of The New Jersey and New York Railroad Company,
Petitioner,

vs.

ERIE RAILROAD COMPANY, JOHN A. HADDEN, C. E. DENNEY AND ROBERT E. WOODRUFF,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court of the United States

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PETER DURYEE,
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ERIE RAILROAD COMPANY, JOHN A. HADDEN, C. E. DENNEY AND ROBERT E. WOODRUFF,
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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Case at Bar.

The complaint in the instant case is cast in the form of a plenary suit against—

1. Erie Railroad Company for despoiling assets and property of the New Jersey & New York Railroad Company during the period December 4, 1912 to June 30, 1938; and
2. John A. Hadden and Robert E. Woodruff, as court appointed Trustees of both Erie and New Jersey & New York in the Ohio reorganization proceedings for continuing the acts complained of against Erie, during the period from June 30, 1938 to December 30, 1941.

Reorganization of Erie Railroad Company was consummated in 1941 and the reorganized Erie was released and discharged from its debts, obligations and liabilities by Bar Order 386 entered December 20, 1941 (E. 4809). By Order 407 (E. 5063) entered March 27, 1942, the final report and account of respondents Robert E. Woodruff and John A. Hadden as Ohio Trustees of the New Jersey & New York Railroad Company was approved, and they were discharged from all further duty, obligation or liability as Trustees of the property of such Debtor.

The present action was commenced September 19, 1949.

With respect to Erie Railroad Company the basic issue in this case, as in the former case of *Duryee v. Erie Railroad Company* (in the Supreme Court of the United States, October Term 1949, No. 292, certiorari denied 338 U. S. 860), and related cases, is—

> Does the consummation of the Erie Reorganization proceedings in 1941, and the orders entered therein, bar petitioner from maintaining a plenary suit for money recovery against reorganized Erie on claims alleged to have accrued prior to such reorganization?

As to the individual respondents, Hadden and Woodruff, the basic issue is similarly—

> Do the prior determinations and orders entered in the Erie and New Jersey Reorganization proceedings and applicable provisions of the bankruptcy statutes preclude petitioner from, at this time, maintaining a plenary suit for money recovery on matters arising in connection with the administration of the Ohio estate of the New Jersey & New York Railroad Company, Debtor?

Prior Litigation.

As pointed out by the District Court in granting summary judgment herein:

> "The charges made against Erie in the present complaint, * * * add nothing of substance to what has already been before this court in the sum total of * * * *three previous actions* and what has already been duly considered by this court. *They merely reiterate in different verbiage and with elaboration the identical matter set forth in the three prior assaults on the bar order.*" (Emphasis added.)

The court was referring to the cases of *Duryee v. Erie Railroad Company*, 76 F. Supp. 635, affirmed 175 F. (2d) 58, certiorari denied, 338 U. S. 860; *Beckley v. Erie Railroad Company*, 76 F. Supp. 635, affirmed 175 F. (2d) 64 and *In re Petition of Charles Massie*, 76 F. Supp. 635

With reference to these preceding suits the District Court said:

> "The three actions were heard by Judge Wilkin of this Court. While both the Duryee and Beckley actions were cast in the form of plenary suits to which the bar order was pleaded as an affirmative defense, both actions were in essence, like the Massie petition, attempts to vacate or modify the bar order in so far as it foreclosed claims of New Jersey. The fact that the plenary suits were brought in the same Court that issued the bar order made the form in which the actions were brought comparatively unimportant, and the trial Court treated the actions, alternatively, as seeking to state a basis for reopening the Erie Plan of Reorganization."

In each of the three preceding cases the trial court found that respondent Erie Railroad Company was entitled to summary judgment as a matter of law, and refused to permit the assertion of pre-existing and provable debts or claims, against a reorganized company, more than

five years after such reorganization. In so doing, the court said in part:

> "It would be unjust and unfair to those who have accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which were the basis of its earlier acceptance." 76 F. Supp. 635, 639.

ARGUMENT.

As to respondent Erie Railroad Company.

Petitioner claims that (1) he has been improperly precluded in this case from proving a fraudulent conspiracy practiced upon the court in obtaining the bar order in the Erie Reorganization proceedings (p. 8); and (2) that the prior *Duryee* case is not res adjudicata for the reason that "the issue of fraud in procurement of the final decree and bar order in the Erie Reorganization was not raised by the pleadings." (p. 11.) It is similarly argued that "there was no allegation in the *Beckley* case that the 'bar order' had been obtained by fraud upon the court which issued it."

It has been repeatedly argued by petitioner that under Rule 8 (d) of the Federal Rules of Civil Procedure he was entitled to avoid such affirmative defense of the "bar order" by showing fraud in its procurement. In fact, this is the identical question stated in the petition for certiorari in the former *Duryee* case before this Court, where at page 16 it was urged:

> "In both courts below, moreover, petitioner contended that they (Erie's affirmative defenses) *gave rise to particular questions as to whether the bar order and the other orders invoked by Erie were obtained as a part of a scheme of fraud and breach of trust of Erie or its trustees,* * * *." (Emphasis added.)

That such issue was renewed in the instant case is set forth clearly in an affidavit filed by the petitioner (R. p. 36) in the following language:

> "7. It is plaintiff's intention to oppose this motion for summary judgment by showing by affidavits and depositions that the 'bar order' and other orders referred to in paragraph numbered '6' above were procured by fraud of the defendant and as part of a fraudulent scheme, as set forth in the complaint." (fol. 107.)

Thus it is clear that without recourse to petitioner's collaboration in the *Beckley* and *Massie* proceedings tried simultaneously with the first *Duryee* case, *the issue now relied upon is identical with that asserted in the first Duryee case.*

The District Court quite appropriately refused to entertain a fourth attack on the bar order containing charges of fraud based on facts which were not only known to the plaintiff at the time of his prior action but as shown above, were actually urged by him in such action.

In the instant case, as in all previous cases, the trial court took judicial notice of the complete record of the proceedings in the Erie Reorganization. On the basis of the uncontroverted facts before it, the trial court, which was also the reorganization court, has four times found that there is "no genuine issue as to any material fact" and has found that the moving parties are "entitled to judgment as a matter of law." In so holding it had the benefit of the prior opinion of the reorganization judge in the former cases of *Duryee v. Erie Railroad Company, Beckley v. Erie Railroad Company* and *In re Petition of Charles Massie, supra.*

The record clearly shows that Respondents Hadden and Woodruff, and the District Court conducting the reorganization proceedings, at all times recognized the possibil-

ity of a conflict of interests between the Erie estate and the New Jersey estate. In the original order of that Court appointing Hadden and Denney as Trustees of the New Jersey on August 2, 1938 (E 735) the Court found specifically that the operation of the property of the New Jersey was largely conducted by the use of terminals, trackage and equipment under contract by the Trustees of the Erie, and that it was the opinion of the Court *that the appointment of trustees of the property of the Erie as trustees of the property of New Jersey would best serve the interests of all parties.*

By petition dated February 1, 1939 (E 1329), the New Jersey Trustees represented that, as Trustees of the Erie, they had filed on December 30, 1938 a claim against the estate of New Jersey for $5,812,390.88 and that by reason of the conflict involved in such indebtedness and *contractual relationships,* an exigency had arisen requiring the appointment of special counsel in no wise connected with the estate of the principal debtor. On February 13, 1939 an order was entered appointing William J. Morrison, Jr., of Hackensack, N. J., a former President of the New Jersey State Bar Association, as special counsel for the New Jersey Trustees for the purpose of acting and advising them with respect to the claim of the Trustees of the Erie against the estate of New Jersey and *any matters involving a conflict of interest between the estates of Erie Railroad Company and the New Jersey & New York Railroad Company, respectively.* (E 1335.)

As shown by the petition of the Trustees of New Jersey (E 1609) dated June 7, 1939, it appears that Mr. Morrison advised that—

> "by reason of the ownership by Erie of stock in the New Jersey and the fact that the same persons were officers of both of the railroads at the time the above mentioned contracts were made and since that time, it is

desirable and proper that the terms and conditions of the aforesaid agreements, and the charges made pursuant to said agreements, should be examined by some independent person, who, by reason of his experience in transactions of the nature covered by these contracts, and the charges made for the same, is competent to advise your petitioners as to the propriety and fairness of the contracts so made and the charges based upon the same as aforesaid."

Said petition was referred by the District Court to Special Master William L. West, who, after hearing upon the petition, filed his interim report dated July 1, 1939 (E 1613) in which he advised that Erie Railroad Company was the owner of 83 percent of the capital stock of the New Jersey, and that throughout their relationship Erie Railroad Company and New Jersey & New York Railroad Company had had common officers, and *that under the circumstances the Trustees of New Jersey,* who were the same as the Erie Trustees, *were not in a position to pass upon the claim of Erie Railroad Company against its subsidiary, the New Jersey.* The Special Master further advised the Court that in his opinion it was therefore advisable to have an impartial person examine Erie Railroad Company's claim against the New Jersey & New York Railroad Company and the contracts between the two railroad companies and the charges arising thereunder, and to make a report of his findings. The Special Master further reported that of the two experts whom he had interviewed, Mr. Lawrence Richardson of Melrose, Massachusetts, was the one whom he recommended to be appointed, giving as his reason that Mr. Richardson, by reason of a study made by him in 1937 on behalf of a Committee of Bondholders of the New Jersey respecting its operations and its relationship to Erie, was already somewhat familiar with the problems involved with respect to the claim of Erie against New Jersey. He

also gave as his reason for his recommendation the fact that *Mr. Richardson's appointment was fully approved by the Committee of Bondholders of New Jersey whose counsel appeared at said hearing on behalf of the appointment of Mr. Richardson.*

On July 20, 1949 the Reorganization Court entered its order in the Reorganization Proceedings appointing Lawrence Richardson as the expert (E 1619). On the 15th day of April, 1940, Lawrence Richardson filed his report in said Reorganization Proceedings recommending that the claim of Erie against New Jersey be allowed in the amount of $5,812,390.88, and on July 31, 1940, the Court approved said Richardson's report (E 2883). (The Erie record shows no exceptions or opposition to any of said orders.)

As stated by the Sixth Circuit Court of Appeals in *Duryee v. Erie Railroad Company,* 175 F. 2d 58, 62:

> "After the trustees had been appointed in the Ohio reorganization proceedings of the New Jersey company, they asked the district court that this large claim be examined by some independent person, who, by reason of experience in such transactions, would be competent to advise the trustees as to the fairness of the charges made by Erie. The Special Master appointed by the court to consider the petition thereupon recommended the appointment of the same expert that had been previously engaged by the New Jersey bondholders themselves to investigate the claim, and upon notice given to all interested parties, the expert in question was appointed, and after considering all the debits and credits between the two companies, subsequently made his report to the Ohio district court that the claim of Erie against New Jersey was warranted. All of the foregoing would seem largely to dissipate appellant's present contention that all the obligations incurred by New Jersey, both by way of bonded indebtedness and that in-

curred during the course of New Jersey's operations, were, and are, nothing more than the indebtedness of Erie."

To characterize the action of the Ohio Reorganization Court in dealing with the fairness of all of the charges made by Erie against New Jersey prior to trusteeship, it may be said that the Court at the request of the New Jersey bondholders said:

> "All right, we will put your own man in and take his decision as to whether Erie's claim is fair and just."

After the bondholders' expert investigated and reported that the claim was fair and just and after the Court had closed the Erie reorganization, it should not be open ten years later for those bondholders or their representative Trustee, Duryee, to cry fraud with respect to the very same matters.

As to respondents Hadden and Woodruff.

Petitioner argues that the lower courts erroneously applied the statute of limitations to the causes of action asserted in the complaint against individual respondents Hadden and Woodruff. His argument is that Section 11 (d) of the Bankruptcy Act does not apply for the reason that the estate of the New Jersey in reorganization under Section 77 pending in the United States Court for the Northern District of Ohio *has not been closed.*

In this connection it is pertinent to point out the relevant parts of the record of the Erie Reorganization Proceedings leading up to the discharge of the respondent Trustees:

By petition dated September 10, 1941 (E 4213) Messrs. Woodruff and Hadden filed a request that an order be entered dismissing the proceedings for the reor-

ganization of the New Jersey and relieving them of all further responsibility and trust as Trustees of the property of New Jersey and discharging their bonds. In support of said petition it was specifically alleged in part as follows:

> "that the operation of the property of the New Jersey for a considerable time prior to the filing of said company's petition in these proceedings, *and during the proceedings*, has been conducted at a continuous loss;
>
> "that from July 1, 1938 to June 30, 1941, the estate of the New Jersey had incurred a net deficit from operation of $543,722.68;
>
> "that Trustees of the Erie had filed a claim against New Jersey for a total amount as of December 28, 1938, of $5,803,983.62;
>
> "that said contracts were examined by Lawrence Richardson, a disinterested party appointed by this court under Order No. 159, whose report in writing is filed herein and the text thereof printed at page 2877 of the printed record herein, and was to the effect that the evidence warrants an acceptance of the details embodied in the claim, which report was approved by Order No. 240 herein." (Emphasis added.)

Hearing upon such petition for the dismissal of the proceedings was thereupon noticed to the creditors and parties interested in the New Jersey proceedings (Order 338—E 4221), and by Order No. 343 (E 4265) dated October 1, 1941, the Court approved suggestions made by representatives of holders of substantial amounts of the bonds of New Jersey to the effect that it was contemplated that if the Ohio court should consent and approve, appropriate steps would be taken for the appointment by a court of competent jurisdiction of a receiver or trustee of the property of the New Jersey in anticipation of the proceedings for the reorganization of New Jersey being

terminated, and the property of the company being transferred to the trustee or receiver so appointed.

Immediately thereafter, on October 2, 1941, proceedings for the reorganization of New Jersey in the District Court for the State of New Jersey were initiated by bondholders of New Jersey and Petitioner herein was on November 17, 1941 appointed Trustee of such proceedings. Said appointment was approved by the Interstate Commerce Commission on December 17, 1941, and he qualified by filing his bond on December 29, 1941.

By Order No. 393 (E 4895) dated January 2, 1942, the District Court of Ohio confirmed the vesting of the property of New Jersey in Peter Duryee as Trustee as of 12:01 A. M. January 1, 1942, and provided further as follows:

> "That from and after 12:01 A. M. January 1, 1942, Robert E. Woodruff and John A. Hadden, as Trustees of the property of the New Jersey & New York Railroad Company, are relieved of all responsibility and trust with respect to the operation, maintenance and management of the business of the New Jersey & New York Railroad Company and its property."

On February 26, 1942 (E 5041) the final report and account of Messrs. Woodruff and Hadden as Trustees of New Jersey, and the petition of said Trustees for an order approving and confirming said final report and account and discharging them as said Trustees, was filed. In such final report and account they referred to monthly income statements and balance sheets filed in the proceedings and showing the results of the operation of New Jersey for the period from July 1, 1938 to December 31, 1941, inclusive, and with respect to such period submitted comparative balance sheets, income accounts, profit and loss statements and cash receipts and disbursement statements. They further submitted—

"that they have each well and duly performed their individual duties as Trustees of the property of the New Jersey & New York Railroad Company, have abided by and performed all things which they have been directed by this court to do and have duly accounted for any and all moneys and properties which at any time came in to their hands as such Trustees."

As shown hereafter a copy of such final report and account and petition was served upon Peter Duryee, Trustee, Petitioner herein.

By Order 405 (E 5059) entered March 2, 1942, the District Court set down for hearing the final report and account of Messrs. Woodruff and Hadden, specifically providing as follows:

"(1) That any party in interest may file objections to said final report and account on or before March 20, 1942, said objections to be filed in writing in triplicate with the clerk of this court, clerk to deliver one copy of any objections so filed to H. A. Taylor, Counsel for the Trustees.

"(2) That a hearing to be held on any objections which may be filed in accordance with this order, and on the approval of said final report and account and on said petition, at 10:00 o'clock A. M. March 27, 1942, before Special Master William L. West, Room 630 Bulkley Building, 1501 Euclid Avenue, Cleveland, Ohio.

"(3) That said Trustees shall mail on or before March 5, 1942, a copy of the said final report and account and petition in connection therewith and a copy of this order to *Peter Duryee, Trustee of the property of the New Jersey & New York Railroad Company in proceedings in the United States District Court for the District of New Jersey*, and to all parties who have intervened or appeared herein or their attorneys, except that said attorneys with offices in Cleveland, Ohio, may be served personally in lieu of service by mail." (Emphasis added.)

By Order No. 407 (E 5063) entered March 27, 1942, the court found that the hearing came on on due notice and that there were no objections by any party appearing at the hearing and that as a result the final report and account of the Trustees were in all respects approved and confirmed, and:

> "That Robert E. Woodruff and John A. Hadden be and each of them *is hereby discharged from all further duty, obligation or liability as Trustee of the property of The New Jersey and New York Railroad Company* herein and the surety bonds filed by each of the said Trustees be and they are hereby cancelled and released." (Emphasis added.)

It, therefore, is clear that in connection with the final account and report of the Trustees, Peter Duryee was in no way precluded from excepting to the fairness of the amounts paid by such Trustees to the estate of Erie Railroad Company, Debtor, under such contracts or operating agreements.

It is also clear that the estate of the New Jersey in reorganization under Section 77 of the Bankruptcy Act pending in the United States District Court for the Northern District of Ohio was, as of March 27, 1942, finally and completely closed. By way of summary, this was effected as follows:

1. Respondent Trustees filed petition to dismiss;
2. Bondholders of New Jersey initiated independent proceedings in New Jersey through the filing of a new petition for reorganization of the New Jersey under Section 77 and that court appointed complainant as Trustee;
3. At suggestion made by representative of bondholders of the New Jersey, the Ohio court turned over the New Jersey property to complainant as New Jersey Trustee;

4. The Ohio court approved the final account and report of its trustees and discharged them and their sureties, thereby closing the Ohio estate of Debtor.

The order of the District Court upon the final account and report of the Trustees, *upon notice to Peter Duryee, successor Trustee, and other parties interested in the New Jersey proceedings in this Court, is a proceeding within the provisions of the bankruptcy law and unless reversed by the bankruptcy court or modified on appeal, is a final order and the law of the case.* Such order is *res adjudicata* as against collateral attack. See *U. S. ex rel. Woods v. Mayer,* 4 Fed. Supp. 653.

Despite his failure to except to such final report and account, it is the essence of Duryee's present complaint that Messrs. Hadden and Woodruff, in connection with their administration of the estate of the New Jersey, fraudulently and in breach of fiduciary duties and obligations overpaid the estate of Erie Railroad Company, Debtor, for services, rentals, material, divisions, etc.

Nowhere does Appellant claim that the alleged improper acts of Appellees Hadden and Woodruff resulted in gain to or the enrichment of themselves or of any person other than Erie.

When the Court, therefore, approved the Trustees' final report and account and granted their Petition for Discharge, it must be held to have affirmatively found that the representations made in said petition, that "they have each well and duly performed their individual duties as Trustees of the property of the New Jersey & New York Railroad Company, have abided by and performed all things which they have been directed by this Court to do and have duly accounted for any and all moneys and properties which at any time came into their hands as such Trustees" were true. Having received a copy of such Final Account and

Report and Notice of Hearing upon the same, it is apparent that plaintiff is now precluded from asserting claims of the nature set forth in his present complaint, either against appellee Erie or the individual appellees.

The present action against Appellees Hadden and Woodruff was commenced on September 19, 1949, almost seven and a half years after said defendants had been discharged as trustees of the New Jersey by the District Court.

As pointed out by the trial court—

> "Even if this be a case involving such fraud (personal fraud of the trustee) *it is clear from the undisputed facts that plaintiff here has slept inexcusably on his rights.*" (fol. 139) (Emphasis added).

Petitioner's cause of action is barred under the express language of Section 11(d) of the Bankruptcy Act which provides as follows:

> "Suit shall not be brought against any person who has acted as a receiver or trustee of a bankrupt estate, upon any matter arising in connection with the administration thereof, subsequent to two years after the estate has been closed."

Supplementing the limitation contained in the above section is a similar limitation contained in Section 50(m) of the Bankruptcy Act (11 U. S. C. A. Sec. 78(m)) as follows:

> "Proceedings upon receivers' or trustees' bonds shall not be brought subsequent to two years after their respective discharges."

These statutes, being statutes of repose as indicated in the case of *Kinder v. Scharff*, 231 U. S. 517, are specifically made applicable to trustees of railroads in reorganization under Section 77 (11 U. S. C. A. 205) with respect to which the following provisions are pertinent:

"77(1) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor, and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Section 77(c)(2) provides in part as follows:

"The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of the trustee appointed pursuant to Section 44 of this Act, or any other section of this Act and to the extent not inconsistent with this section, the powers of a receiver in an equity proceeding * * *."

Moreover, in Section 77(j) other parts of Section 11 are specifically referred to as obtaining in railroad reorganization proceedings.

In *Collier on Bankruptcy*, 14th ed. at p. 1184, in his discussion of Section 11(d), it is pointed out as follows:

"The phrase 'after the estate has been closed' does not mean the date of discharge or refusal of discharge, but rather it refers to the date when the final decree approving the trustee's account and discharging him is entered."

The specific charges made by Appellant against Appellees Hadden and Woodruff are obviously in connection with "matters arising in connection with the administration" of the Debtor's estate.

CONCLUSION.

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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